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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 632

FUKAYA TRADING CO., S. A.

versus

EASTERN MARINE CORPORATION, OWNER OF THE S/S EASTERN ARGO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

FUKAYA TRADING CO., S. A.

versus

EASTERN MARINE CORPORATION, OWNER OF THE S/S EASTERN ARGO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FUKAYA TRADING CO., S. A., a Panamanian Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit Court entered in the above cause on July 25th, 1966.

Opinion Below

The opinion below is set out in full in Appendix A. It is not yet reported.

Jurisdiction

Jurisdiction for this petition is provided for by 28 U.S.C. 1954(i) and this petition is timely filed. 28 U.S.C. 2101(c).

Statute Involved

The statute involved is the Federal Arbitration Act, 9 U.S.C., § 1-14.

Question Presented

The matter presents two questions: Not only the correctness of the decision below, but whether in reaching its decision, the opinion of the Court of Appeals went so far that it, in effect, abridged the authority of the Arbitrators to whom the Court of Appeals thought this matter should be referred for its ultimate determination.

The issues in the Court below were two-fold:

1. The time charter provided that the Charterer agreed to hire and the Owner agreed to let the vessel, S/S EASTERN ARGO, from the date of delivery. Was delivery, therefore, a condition precedent to the effectiveness of the contract, so that the parties were not bound to arbitrate until delivery of the vessel?

2. Where arbitration has been demanded, and subsequently the vessel is delivered under strict statement by the Charterer that it would accept the vessel only under certain conditions, is arbitration waived?

In determining this matter in favor of the Owner and requiring arbitration, the Court of Appeals defined the words "hire" and "delivery", and in its opinion recited the legal effect of the contract, without limiting itself to the simple question of the "right of arbitration". Does this language so abridge the authority of the Arbitrators that the matter should be referred to a Court for determination and not to Arbitrators?

Statement of the Case

Petitioner, FUKAYA TRADING CO., S.A., a Panamanian Corporation, entered into a charter party with EASTERN MARINE CORPORATION, on November 18th, 1964, for the hire of the S/S EASTERN ARGO. The time charter provided "that the said Owners agree to

let, and the said Charterers agree to hire[1] the said vessel, from the time of delivery, * * * Charterers to designate place of delivery." (See Appendix "B" — Charter Party) Petitioner, as Charterer, notified the Respondent, as Owner, to deliver the vessel to the wharf of Southern Scrap Material Co., Ltd. on the Industrial Canal, New Orleans, Louisiana.

When the vessel arrived at the Port of New Orleans, on January 13th, 1965, the port was subject to a general maritime strike. On this date the Respondent-Owner made both telephonic and written notice of readiness to the Petitioner. In its written notice it advised that the vessel had been detained at "General Anchorage" for the reason that "the Crescent River Port Pilots Association has been unable to get permission from the International Longshoremen Association for the Chief Pilot to cross the picket line at Port ship's service for the purpose of shifting the vessel from the General Anchorage to Southern Scrap Material Co., Ltd.'s Terminal". Your Petitioner, as Charterer, then advised the Owner that it was the Owner's responsibility to deliver the vessel to the designated wharf, and that the notice of readiness would not be accepted. On February 10th, 1965, Petitioner filed an action with the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment concerning the respective responsibility between the Owners and Charterers with regard to the delivery of the vessel. On the same day, but after suit was filed and notice had been furnished Owner to this effect, the Owner demanded arbitration. Petitioner-Charterer moved the District Court for a stay of arbitration, which was granted.

On February 12th, 1966, the strike terminated in New

[1] All emphasis shown in this petition is at the instance of Petitioner, and will not be further noted.

Orleans, and the Owner informed the Charterer that the vessel was ready for docking. Charterer stated its position that it would accept the vessel on the basis that the notice of February 12th, 1966 was the only "valid notice of readiness". The vessel was then delivered by the Owner to the Charterer and thereafter proceeded in accordance with the charter party.

Respondent perfected an appeal to the Court of Appeals from the order staying arbitration, and the Court of Appeals reversed the District Court and ordered arbitration to proceed.

Reasons for requesting writ

I.

Petitioner contended that the arrival of the chartered vessel at the loading wharf was a condition precedent to the Owner's right of arbitration under the charter party.

This is apparently the first time that this matter has been submitted for judicial determination. Neither petitioner nor respondent, nor the Court of Appeals, was able to cite any case directly in point.

The Court below stated that the rule of *Pahlberg*[2] was applicable to this case.

> "Arbitration may be compelled except as to the issue whether the contract containing the clause was ever made or was void for fraud **or other illegality.**" (Emphasis added)

Applying *Pahlberg*, Petitioner contended that delivery was a condition precedent to the contract becoming effective, and therefore, the basis of illegality *ab initio* of the contract. In overruling this contention, the Court of Ap-

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[2] 2 Cir. 1942, 131 F. 2nd 968, 970.

peals rewrote the contract between the parties by relying upon presumptions and by writing out of the contract its very language.

(a) The contract says:

> "Said Owners **agree to let**, and the Charterers **agree to hire** * * * "

The Court below says:

> "The Charterer would have the phrase signify that the November 18th, 1964, charter party was nothing more than **an agreement to contract for hire** at a later date. We think that interpretation is wrong." (Emphasis added)

in other words, despite the fact that the agreement itself says that the parties "agree to let *** * and hire" the Court below says it does not mean this.

(b) In order to reach an interpretation of the word "hire" and the words "time of delivery" to support its position, the Court now takes the position that these words do not have the meaning that ordinarily would be ascribed to them in a contract between the parties:

> "The words 'hire' and 'time of delivery' have a special meaning in Maritime Law."

The Court says that "hire" means:

> "To engage a vessel for hire or freight, the charges payable for the time the ship is utilized by the charterer".

This is our position, and has been determined by the Court. Why must we arbitrate this legal point?

(c) The word "delivery" has been completely written out of the contract. The opinion states:

> "The term 'delivery' is something of an anachronism in the charter party commonly used today * * *."

and goes on to say:

> "In the modern carriage charter party, the owner does not deliver possession but agrees that during a certain period he will render the services of his servants and crew to carry goods put on board by the charterer."

This, in spite of the fact that the words "delivery" or "place of delivery" appear at least five times in this charter party. In other words, the Court of Appeals would have us read this charter party by eliminating its original language to the effect that the parties **agree to let and hire from the time of delivery,** and that we should also eliminate from the contract itself all reference to the word "delivery". This is a rewriting of the contract by the Court based upon pure "speculation". We mean no disrespect by the use of the word, because we are using the language of the Court itself:

> "The short of it is that the 'hire delivery' phrase has only general legal significance in the time charter of this case. We **speculate** that the phrase expresses in a broad fashion the agreement of the parties that the charterer will incur charges for hire from the time the vessel has become an 'arrived ship' after proper 'notice of readiness' according to the precise rule set out in maritime law and in the charter party itself." (Emphasis added)

Our position was based upon the universal premise that the parties may enter into an agreement subject to a condition precedent, in this case the delivery of the vessel at a specified wharf. This contention has been overruled by the Court below by reading out of the contract all of the

precise language of the agreement itself, which clearly supports Petitioner's position. We suggest that this is a misuse of the judicial prerogative.

II.

The next question on the merits of the controversy presented to the Court was whether the Owners had waived their demand for arbitration. When the general maritime strike had been settled, Owner asked if the dock was ready and it tendered the vessel. Charterer replied that the dock was ready, but that it would only accept the vessel upon the consideration that this second notice would constitute the only proper notice of readiness. The Owner then delivered the vessel and the vessel proceeded according to the charter party.

It is our contention that once having demanded arbitration, when the Owner delivered the vessel after having been notified that the position of the Charterer was that it would only pay charter hire from the date of the second notice of readiness, it then waived its right to arbitration.

The Court below did not decide only this issue. The simple issue was whether this waived the arbitration clause. The Court below decided in effect that this did not waive any substantive rights between the parties. The opinion says:

> "We conclude that the owner took sufficient steps to reserve its rights as to the time hire commenced."

This is a determination of the principal issue of the case, not the simple issue of whether the action of the Owner waived its previous demand for arbitration, and accordingly had estopped itself from proceeding with the arbitration process.

III.

We would not be so presumptuous as to make this application for certiorari if the decision of the Court below, in our opinion, did not go beyond a determination of the mere issue before it. The major contention which we make now is that both parties' rights before the Arbitrators are rendered abortive because in its opinion the Court below proceeded to use language which can now be grasped by the Owner, by the Charterer or by any of the Arbitrators as setting down the ground rules for deciding the questions which properly would be the prerogative of the Arbitrators. This deprives the Arbitrators of their right to establish both the "law and facts" of the case, and in so doing we urge that the Court of Appeals has so exceeded the basic issues of this case, that the only way that the parties can receive proper treatment is for it to be remanded to and decided by the District Court, and not by Arbitrators who will be "commercial people" and thus possibly misled by the language of the Court of Appeals.

We have already pointed out that one of the issues before the Court of Appeals was the question of whether the action of the Owners waived their previous demand for arbitration, and that its opinion was not limited to this issue, but went on to decide the principal issues: For example, a decision to the effect that the Owner took steps to reserve its rights when no evidence on this point had been presented, and this was not the issue in the case.

This, however, is not the only occasion on which the Court of Appeals proceeded to pronounce decisions beyond the mere question of arbitration. Following are examples of the language of the Court apparently prior to the principal issue of the case and not to the simple issue of arbitration:

> "In the modern carriage charter party, the owner does not deliver possession but agrees that during a certain period he will render the services of his servants and crew to carry goods put on board by the charterer." (Page 8)

> "We speculate that the phrase expresses in a broad fashion the agreement of the parties that the charterer will incur charges for hire from the time the vessel has become an 'arrived ship' after proper 'notice of readiness' according to the precise rules set out in maritime law and in the charter party itself." (Page 8)

> " 'To hire' in the time charter means to engage a vessel for hire or freight, the charges payable for the time the ship is utilized by the charterer." (Page 7)

Although the language of the contract is clear, as we have said many times above, that the Owners agreed to let and the Charterer agreed to hire the vessel from the time of delivery, the Court of Appeals goes on to say, although there is no evidence of custom, and no custom has been urged, or forms a part of the pleadings, that

> "We know of no custom in the shipping trade that compels an implied condition of arrival to the initial formation of a contract between the charterer and the owner."

Not only did we not urge that there was any custom, but we state unequivocally that there is no question of an implied condition—the condition is set out in unequivocal language in the contract itself.

It was not necessary for the Court below to define "hire" and "delivery", to conclude that the Owner had reserved its rights or to make any of its other broad and sweeping declarations concerning the meaning of the char-

ter party in order for it to determine whether this was an agreement to let and hire conditioned upon delivery of the vessel, or whether arbitration had been waived. However, in so doing, we urge that the Court of Appeals has so prejudiced the position of either of these parties before the Arbitrators, that arbitration will be abortive, since the Federal Arbitration Act and the decisions construing it clearly provide that both questions of law and fact shall be determined by the Arbitrators.

CONCLUSION

Petitioner, FUKAYA TRADING CO., S.A. respectfully prays that this Court issue its writ of certiorari directed to the Court of Appeals for the Fifth Circuit and that upon consideration of this matter, that the decision and mandate of the Court of Appeals be set aside, and this matter be remanded to the U. S. District Court for determination on its merits.

STEEG AND SHUSHAN,

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New Orleans, La.

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition has been served on Mr. William Stone of Deutsch, Kerrigan & Stiles, Hibernia Bank Bldg., New Orleans, Louisiana, this 30 day of September, 1966.

Moise S. Steeg, Jr.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22581

EASTERN MARINE CORPORATION, owner of the S/S EASTERN ARGO,

Appellant,

versus

FUKAYA TRADING CO., S.A.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 25, 1966.)

Before JONES, WISDOM, and GEWIN, Circuit Judges.

WISDOM, Circuit Judge: This case presents the question whether the arrival of a chartered vessel at the loading wharf is a condition precedent to the owner's right of arbitration under a government form time charter. The district court granted the charterer's motion for stay of arbitration, on the ground that arrival at the wharf was a condition precedent. It denied summary judgment pending the outcome of this appeal. We reverse and remand for an order directing arbitration and other appropriate relief.

I.

The libellant Fukaya Trading Co., S.A. "made and concluded" a charter party in New York City November 18, 1964 with the respondent Eastern Marine Corporation, owner of the S/S Eastern Argo. It was a time charter on the standard government form.[1] Under the charter party, the owner agreed "to let" and the libellant agreed "to hire" the Eastern Argo "from the time of delivery" in New Orleans between January 2 and January 13, 1965 until "redelivery" at a safe port in Japan or Formosa. The document provided that the vessel was "to be placed at the disposal of the Charterers" in the dock or at the wharf directed by the charterer. The owner was to give five days notice of readiness, but "time" was to "count from 7 a.m. on the working day following that on which written notice of readiness has been given". The agreement further provided for arbitration of "any dispute" that should arise between the owner and the charterer.

The Eastern Argo arrived at the New Orleans anchorage January 13, 1965 at 3:30 p.m. to load the charterer's cargo of scrap. The ship's agent that afternoon tendered written notice of readiness to the charterer. However, that same day the International Longshoremen's Association commenced a general strike in the Port of New Orleans. The union would not allow the Crescent River Port Pilots' Association to cross its picket line for the purpose of shifting the Eastern Argo to the charterer's wharf.

The union's refusal triggered a dispute between the parties as to whether the charter hire ran before the vessel

[1] The government form "time charter," the conventional New York Produce Exchange form, originated in 1913. The form used by these parties carried amendments approved through October 3, 1946. The parties substituted new war risk and collision clauses and made several other changes not important to this litigation.

reached the charterer's wharf. The charterer January 13, 1965 asserted that the notice of readiness received that afternoon was ineffective because it failed to comply with the alleged charter party requirement that the vessel must stand ready in the charterer's dock for hire to begin. The owner countered with a demand for hire the following day according to the charter party.

To relieve this stalemate, the owner February 5, 1965 threatened to demand arbitration unless assurance of payment for the first month's hire were received immediately. This assurance was not given, and February 10 the owner made formal demand for arbitration. The same day, the charterer filed this action for declaratory judgment. The complaint seeks a declaration that the owner is not entitled to receive time charter hire until the vessel is placed in the charterer's dock.

February 12 the strike terminated in New Orleans, and the union granted permission to bring the Eastern Argo to the charterer's wharf. The owner informed the charterer that the vessel remained ready for immediate docking. The charterer replied that its dock was available immediately, but reiterated its position that charter hire commenced only upon arrival at the dock and that the only valid notice of readiness was the one received that day. The record shows no further negotiation on the "hire" issue at this time. The vessel proceeded to the charterer's dock, loaded the cargo, and sailed for Tokyo.

February 15, 1965, the owner moved to stay the declaratory judgment proceeding and petitioned for arbitration under the Federal Arbitration Act.[2] February 24 the

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[2] 9 U.S.C. §§ 1-14.

court tentatively granted this motion and directed arbitration. At the same time, the court gave the charterer permission to file a supplemental libel, incorporating the facts of the eventual arrival of the vessel at the wharf.

March 17, 1965, the court reversed itself after a new hearing on the various pending motions. It now granted the charterer a stay of arbitration. The court stated that the arbitration was not in order because the ship was not delivered; the charter agreement did not become an executed agreement; and the contract was silent as to fortuitous events such as the maritime strike. The owner filed notice of appeal from this new order. The charterer pressed forward April 9 with a motion for summary judgment. However, the court, upon motion of the owner, declined to decide the case on summary judgment pending the outcome of the appeal to this court on the arbitration issue. The owner at this time also filed an affidavit alleging several factual issues, including the union's willingness to load at wharves other than the charterer's, that could bar summary judgment.[3]

II.

The central issue in this appeal is whether the arrival of the Eastern Argo at the charterer's wharf was a condition precedent to the owner's right of arbitration under the charter. The arbitration clause provides "that should any dispute arise" between the owner and the charterer, the matter shall be referred to commercial men in

[3] The Eastern Argo by this time had arrived in Tokyo. The owner asserted a lien on her cargo for hire including the disputed period before arrival of the vessel at the charterer's dock in New Orleans. The charterer moved this Court April 22, 1965, for fixing of a bond and release of the lien. We remanded the matter to the trial judge for appropriate relief. The trial court thereupon ordered release of the lien upon the filing of a $76,000 bond by the charterer.

New York for decision.[4] The owner contends that "any dispute" includes any matter that might arise between the execution of the contract November 18, 1964 and the arrival of the ship in January or February 1965. The charterer insists that the arbitration clause does not take effect until arrival of the vessel at a wharf appointed by the charterer. The charterer relies primarily on the clause in the charter that provides:

> "WITNESSETH, That the said Owners agree to let, and the said Charterers agree *to hire the said vessel, from the time of delivery*. . . . " (Emphasis added.)

The charterer also calls attention to a cancellation provision in the charter.[5] According to the charterer's construction of these provisions, no valid charter party and no enforceable arbitration agreement could arise until actual arrival of the vessel at its appointed wharf in New Orleans.

The time charter arbitration clause has been construed numerous times since the passage of the Federal Arbitration Act of 1925. The same general rule for enforcement of the clause has developed in maritime law as in other areas of the law: "[A]rbitration may be compelled except as to the issue whether the contract containing the clause was ever made or was void for fraud or other illegality." *In re Pahlberg* Petition, 2 Cir. 1942, 131

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[4] The full arbitration clause is as follows:

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be commercial men."

[5] "14. * * * [S]hould vessel not have given written notice of readiness on or before January 31st, 1965 * * * Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness."

F. 2d 968, 970. The charterer concedes the validity of this rule and makes no contention that the charter was void for fraud or illegality.

That leaves only one question in the case: Did the parties ever make a contract? The charterer admits that the November 18, 1964 time charter was a valid agreement. But it asserts that the contract could not take effect without satisfaction of a vital condition precedent: Arrival of the vessel at its dock. This condition supposedly arises from the phrase that the "Charterers agree to hire the said vessel . . . from the time of delivery." We find little merit in this contention.

The "hire-delivery" phrase is a term of art in charter parties. The charterer would have the phrase signify that the November 18, 1964 charter party was nothing more than an agreement to contract for hire at a later date. We think that interpretation is wrong. The terms "to hire" and "time of delivery" each has a special meaning in maritime law. "To hire" in the time charter means to engage a vessel for hire or freight, the charges payable for the time the ship is utilized by the charterer.[6] It is unnecessary to form a new contract each time the hire begins. In this case as with most charters, the parties had concluded their contract for hire of the vessel well before the scheduled loading of cargo. The contract contains numerous specialized conditions governing the measurement and liability for hire before and after arrival of the vessel at the loading dock.[7] Formation of the contract prior

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[6] See Carver, Carriage by Sea 322, 922 (Colinvaux ed. 1963).

[7] *E.g.*, Paragraph 5 of the charter party:

"Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners,

Continued

to arrival of the vessel at the charterer's dock indicates the parties' intent to implement all these provisions, as well as the arbitration clause, upon signing of the instrument. The term "delivery" is something of an anachronism in the charter parties commonly used today. The "delivery" term originated in the older demise charter party, in which the owner delivered complete possession and control of the ship to the charterer.[8] In the modern carriage charter party, the owner does not deliver posession but agrees that during a certain period he will render the services of his servants and crew to carry goods put on board by the charterer.

The short of it is that the "hire-delivery" phrase has only general legal significance in the time charter of this case. We speculate that the phrase expresses in a broad fashion the agreement of the parties that the charterer will incur charges for hire from the time the vessel has become an "arrived ship" after proper "notice of readiness" according to the precise rules set out in maritime law and in the charter party itself. We make no pretense to an exhaustive construction of the complex "hire" and "delivery" provisions of this contract. That task we leave to the arbitrators. We do hold that under the time charter before the court the "hire . . . from the time of delivery"

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[7] (Continued)
unless bank guarantee or deposit is made by Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (Owners) may otherwise have on the Charterers. Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given during office hours to Charterers or their Agents before 4 p.m., but if required by Charterers, they do have the privilege of using vessel at once, such time actually used working cargo, shifting berths or bunkering to count as hire."

[8] See Sea and Land Securities v. Dickinson (1942) 2 K.B. 65, 69, cited in Carver, Carriage by Sea 303 (Colinvaux ed. 1963); Gilmore and Black, Admiralty 204-216 (1957); *cf.* Guzman v. Pichirilo, 1962, 369 U.S. 698, 699-700, 82 S. Ct. 1095, 8 L. Ed. 2d 205, 207-08.

phrase does not make arrival of the vessel at the charterer's wharf a condition precedent to operation of the arbitration clause.

The libellant places reliance on *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 2 Cir. 1961, 289 F. 2d 346, *cert. denied*, 369 U.S. 837, in which the court denied arbitration in connection with an auction sale contract. In *El Hoss*, American Oil called for bids for the purchase of transportation equipment that it owned. El Hoss was low bidder and American Oil signed its bid. However, the instrument contained a clause that acceptance by American was conditioned upon the bidder's compliance with certain conditions regarding guarantees, performance bonds, and insurance. Differences subsequently arose between the parties over the fulfillment of these conditions. El Hoss petitioned for arbitration of the issues involved. The Second Circuit, in reversing an arbitration order, remanded the case for findings as to whether the conditions were performed, waived, or excused. The court reasoned that every clause of the agreement, including the arbitration clause, was conditioned upon the bidder's satisfactory performance of basic financial guarantees.

We find the time charter of the present case quite different from the conditional acceptance instrument in *El Hoss*. The conditional acceptance agreement is peculiar to auction transactions and other instances of uncertain credit or authority. In those situations, the seller often reserves acceptance of an offer pending the satisfaction of specified conditions. The contract of sale does not come into being until the seller is satisfied that the conditions have been met. See 1 Corbin, Contracts § 24 (1963). The ordinary time charter, as involved in this case, does not

provide any express conditions for the acceptance of the charterer's offer. We know of no custom in the shipping trade that compels an implied condition of arrival to the initial formation of a contract between the charterer and the owner. In the absence of an express condition to acceptance, as was present in *El Hoss*, the court will presume the formation of a contract upon execution of the document if all the other standard contractual requirements, such as consideration and capacity, have been satisfied. Since the libellant alleges no defects in the formation of the contract other than the condition precedent, we conclude that the arbitration clause did take full effect upon the execution of the agreement November 18, 1964.

The event of the New Orleans maritime strike does not defeat the arbitrators' jurisdiction. American courts have made clear that the frustration of a charter party does not vitiate the arbitration clause. The arbitration clause survives the frustration for the purpose of settling, among other things, whether the contract has in fact been frustrated. *In re Pahlberg's* Petition, 2 Cir. 1942, 131 F. 2d 968; *Goldhill Trading & Shipping Co. v. Caribbean Shipping Co.*, S.D.N.Y. 1944, 56 F. Supp. 31; Anno., 3 A.L.R. 2d 383, 397-400 (1949).

Nor does the cancellation clause in the charter party defeat arbitration. The contract says that if notice of readiness has not been given by January 31, 1965, the charterers have the option of "cancelling this charter at any time not later than the day of vessel's readiness." The clause does not say that the contract itself would be cancelled. American courts for many years have refused as a matter of law to allow the repudiation of an arbitration clause by the cancellation of the charter by either party. The arbitration provision remains operative to settle the issues that might arise from the cancellation. *In re Pahl-*

berg, supra; American Locomotive Co. v. Chemical Research Corp., 6 Cir. 1948, 171 F. 2d 115, 120, *cert denied*, 1949, 336 U.S. 909, 69 S. Ct. 515, 93 L. Ed. 1074; cf. *Sonotone Corp. v. Ladd*, 1962, 17 Wis. 2d 580, 117 N.W. 2d 591; *Terminal Auxiliar Maritama, S.A. v. Winkler Credit Corp.*, 1959, 6 N.Y. 2d 294, 160 N.E. 2d 526, 189 N.Y.S. 2d 655.

III.

The libellant also contends that the owner waived arbitration by its renewed tender of readiness and eventual performance of the charter following the strike. The libellant observes that in accepting the renewed tender, it reiterated its position "that charter hire commences upon arrival at our dock in accordance with terms of charter party." The subsequent delivery of the vessel, argues the libellant, demonstrated acceptance by the owner of an amendment to the original charter party to the effect that the "hire" did not begin until arrival at the dock. The supposed amendment, in the libellant's view, eliminated the issue to be arbitrated, and therefore, this appeal from the stay of arbitration is moot. We do not agree. The original dispute, as the charterer conceded, was over the time at which charter hire commenced. The owner January 22, 1965 expressly asserted by letter that charter hire commenced 7 a.m. January 14 following notice of readiness January 13. The owner demanded arbitration February 10 on the same issue. We conclude that the owner took sufficient steps to reserve its rights as to the time hire commenced. The correspondence between the parties does not demonstrate an intention to amend the charter party. The charterer purported merely to "reiterate our position" rather than to amend the conditions for the owner's performance. The libellant cites *Petition of Howard*, E.D.N.Y. 1943, 53 F. Supp. 556, 560 in support of its contention of waiver.

But in that case the court based its decision of waiver on the fact that the owner accepted without protest an extensive written amendment to the seaworthiness clause of the charter party. In the present action, the owner vigorously asserted its right to the disputed demurrage on several occasions. We hold that the owner did not waive its right to the disputed hire by its eventual performance of the carriage.

We REVERSE the order staying arbitration and REMAND for an order directing that arbitration go forward. The district court may hold the case open to grant appropriate relief in connection with the arbitration, including maintenance of a bond in sufficient amount to secure the owner's claim.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22581

D. C. Docket No. 7105-Admiralty-Div. B

EASTERN MARINE CORPORATION, owner of the S/S EASTERN ARGO,

Appellant,

versus

FUKAYA TRADING CO., S. A.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES, WISDOM, and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order staying arbitration in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for an order directing that arbitration go forward. The district court may hold the case open to grant appropriate relief in connection with the

arbitration, including maintenance of a bond in sufficient amount to secure the owner's claim;

It is further ordered and adjudged that the appellee, Fukaya Trading Co., S. A., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Sep 7 1966 July 25, 1966

Issued as Mandate:

Court Costs:

Docketing Cause, etc.	$ 25.00
Attorneys docket fee due Mr. Wm. S. Stone	100.00
Cost of printing appellant's brief	75.00
Cost of reproducing record	126.46
Total	$326.46

(83)

U. S. Court of Appeals
Filed Aug 22 1966
Edward W. Wadsworth
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22581

EASTERN MARINE CORPORATION, owner of the S/S EASTERN ARGO,

Appellant,

versus

FUKAYA TRADING CO., S. A.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 22, 1966)

ON PETITION FOR REHEARING

Before JONES, WISDOM, and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby

DENIED.

Simpson, Spence & Young

NEW YORK, LONDON AND GLASGOW.

CABLE ADDRESS ARROW NEW YORK

NORTON, LILLY & CO. (PANAMA) INC. NEW YORK

Time Charter

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913—Amended October 20th, 1921 August 6th, 1931; October 3rd, 1946

TO BE RENAMED "EASTERN ARGO"

INCLUDING NUMBER 3 DEEPTANK WHICH DIRTY

250 TONS

BUNKER C

This Charter Party, made and concluded in the City of New York, the 18TH day of NOVEMBER 1964

Between EASTERN MARINE CORP.

Owners of the good... LIBERIAN { Steamship / Motorship } "YUCATAN" of MONROVIA

of 7261 tons gross register, and 4445 tons net register, having engines of ..... indicated horse power

and with hull, machinery and equipment in a thoroughly efficient state, and classed AMERICAN BUREAU

at ..... of about 499,000 cubic feet bale capacity and about 19,735 tons of 2240 lbs.

deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding ..... tons, being capable of carrying about ..... tons on a draft of ..... feet ..... inches on ..... Summer freeboard, inclusive of permanent bunkers, allowing a minimum of 65tp tons) on a draft of ..... feet ..... inches on ..... Summer freeboard, inclusive of permanent bunkers, which are of the capacity of about ..... tons of fuel, and capable of steaming, fully laden, under good weather conditions about 10 knots on a consumption of about 26/27 tons of (Clear Water-cost here grade fuel oil here grade Diesel oil)

now .....

and COMPANIA TRANSPORTE ARROYO Charterers of the City of PANAMA

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for about A TRIP VIA SAFE PORT OR PORTS ON OR OFF COAST

within below mentioned trading limits.

Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party.

Vessel to be placed at the disposal of the Charterers, at NEW ORLEANS ... Owners to give five (5) days notice of readiness

in such dock or at such wharf or place (where she may safely lie, always afloat, at all times of tide, except as otherwise provided in clause No. 6), as the Charterers may direct. If such dock, wharf or place be not available time to count as provided for in clause No. 5. Vessel on her delivery to be ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise, including petroleum or its products, in proper containers excluding ASPHALT AND PITCH IN BULK, AMMONIUM NITRATE, EXPLOSIVES, ARMS, AMMUNITION AND MAHOGANY LOGS, INTENDED SCRAP, EXCLUDING TURNINGS, ALSO EXCLUDING LIVESTOCK, ACIDS AND ANY OTHER DANGEROUS OR INJURIOUS CARGO, (vessel is not to be employed in the carriage of live stock but Charterers are to have the privilege of shipping a small number on deck at their risk), all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports in British North America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or Mexico, and/or South America and/or Europe

and/or Africa, and/or Asia, and/or Australia, and/or New Zealand, but excluding Magdalena River, St. Lawrence between October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding, when out of season, White Sea, Black Sea and the Baltic.

TRADING WITHIN USUAL WARRANTY LIMITS, EXCLUDING COMMUNIST CONTROLLED PORTS AND SATELLITES, AND VIET NAM

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed. Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period of six months or more.

CHARTERERS' CURRENT CONTRACT INSTALLATION PRICE

Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for dunnage, they making good any damage thereto.

3. That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at the current prices in the respective ports, the vessel to be delivered with not less than ..... tons and not more than 200 tons and to be re-delivered with not less than ..... tons and not more than 250 tons.

4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of THREE DOLLARS AND FIFTY CENTS ($3.50) United States Currency per ton on vessel's total deadweight carrying capacity, including bunkers and stores, on summer freeboard, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) at A PORT JAPAN OR FORMOSA AT CHARTERERS' OPTION unless otherwise mutually agreed. Charterers are to give Owners not less than 15 days notice of vessels expected date of re-delivery, and probable port.

5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire. DURING OFFICE HOURS

ACTUALLY USED, WORKING CARGO, SHIFTING BERTHS OR BUNKERING

Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the Charterers or their Agents, subject to 2½% commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, except as customary at similar places where it is customary for similar vessels to safely lie aground.

7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew tackle, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of passengers as far as accommodations allow, Charterers paying Owners ..... per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the conveyance of the passengers, Charterers are to bear such risk and expense. NO PASSENGERS

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. AND DISCHARGE

AT CHARTERERS' OPTION, MASTER TO AUTHORIZE CHARTERERS OR THEIR AGENTS TO SIGN BILLS OF LADING.

9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table, Charterers paying at the rate of $3.00 per day. Owners to victual Pilots and Customs Officers, and also, when authorized by Charterers or their Agents, to victual Tally Clerks, Stevedore's Foreman, etc., Charterers paying at the current rate for meal (or all such victualling) of $3.00

11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo.

13. That the Charterers shall have the option of continuing this charter for a further period of ..... on giving written notice thereof to the Owners or their Agents ..... days previous to the expiration of the first named term, or any declared option.

14. That if required by Charterers, time not to commence before NOVEMBER 2ND 1965 and should vessel not have given written notice of readiness on or before JANUARY 31ST 1965 but not later than 4 p.m. Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.

15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.

16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, of the International Rules of 1924 for Ocean Bills of Lading, at such port or place as the Owners may elect, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or

1950 AT NEW YORK

York-Antwerp Rules

bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier

the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money and, be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

1950 AT NEW YORK

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully, and in the same manner, as if such salving ship or ships belonged to strangers. NEW JASON CLAUSE AS ATTACHED

Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder.

20. Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed to as to quantity, and the cost of replacing same, to be allowed by Owners.

21. That as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, or at least once in every six months, reckoning from time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.

.....

.....

22. Owners shall maintain the gear of the ship as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts than three tons, also extra, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns, and oil for night work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The Charterers to have the use of any gear on board the vessel. VESSEL HAS TO DERRICKS AT 3 TONS.

23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; engineer to provide one winchman per hatch to work winches day and night, as required. Charterers agreeing to pay ~~ordinary engineers, winchmen, deck hands, and deckmen~~ for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the rules of the port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby.

A LUMPSUM OF $300. MONTHLY OR PRO RATA IN LIEU OF OVERTIME.

24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, &c." in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, both of which are to be incorporated in all bills of lading issued hereunder:

U. S. A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

New Both-to-Blame Collision Clause AS ATTACHED

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

25. The vessel shall not be required to enter any ice-bound port, or any port where fever or epidemic is prevailing, or to proceed to any port or place that she may be ordered on account of ice after she shall have arrived at the port of discharge or so near thereto as she may safely get, always lying afloat, but the vessel shall have liberty to enter and remain in any such port or place for the purpose of loading or discharging cargo or ballast, or for repairs, should she consider it dangerous for any of the aforesaid reasons to proceed to or remain at such port or place until the arrival of the vessel there or the subsidence of the ice, and should the vessel not be able on account of ice to reach the port of discharge she may discharge at any safe port or place she may select and the freight shall be paid as per clause 2 on the quantity delivered, or on the quantity loaded if no delivery be effected, and the vessel shall have a lien on the cargo for all expenses incurred by reason of the ice.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

27. A commission of 2½ per cent is payable by the Vessel and Owners to SIMPSON, SPENCE & YOUNG, FOR DIVISION WITH OTHERS PLUS 1½% TO TAIWAN TRADING CORPORATION and 1% TO NORTON, LILLY & COMPANY, INC. on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

28. An address commission of 2½ per cent payable to ..... on the hire earned and paid under this Charter.

CLAUSES 29 THROUGH 37 AS ATTACHED TO BE CONSIDERED FULLY INCORPORATED IN THIS CHARTER PARTY.

COMPANIA TRANSBORTE ARROYO

EASTERN MARINE CORPORATION
BY: NORTON, LILLY & COMPANY, INC.
as Brokers only

BY: _____ Vice Pres.

By authority from Taiwan Trading Corp.

NEW JASON CLAUSE: In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers. Such deposit as the carrier may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

Form No. 103—Printed and Sold by Wm. A. Gay & Co., New York

WAR RISKS CLAUSE

1. No Bill of Lading to be signed for any blockaded port and if after loading has commenced such port becomes blockaded, the Master may at his option load such cargo as he may obtain and proceed to any port he may select and discharge the cargo there or at any other port to which he may be ordered by the Government of the country under the flag of which the vessel sails or by the Government of the country in which the vessel is owned or by the Government of the country in which the vessel is registered or by the Government of the country in which the vessel is managed or by the Government of the country in which the vessel is chartered or by the Government of the country in which the vessel is insured or by any person or persons acting or purporting to act with the authority of such Government or of any department thereof or by any committee or person having, under the terms of the war risks insurance on the vessel, the right to give such orders or directions, or by any combination of such governments, departments, committees or persons, or if owing to any of the above mentioned causes it appears probable that the vessel will be prevented from reaching any port to which she is bound, the Master may discharge the cargo at any port he may think best, or may return with the cargo to the port of shipment or as near thereto as he can get and such discharge shall be deemed to be due performance of this contract. Any extra expense incurred in connection with any such orders or directions shall be paid by the Merchants in addition to the freight and primage and all other charges payable hereunder, such extra expense to be calculated according to the vessel's tariff current at the time of arrival at the port of discharge or at the time of abandonment of the voyage. The vessel shall have a lien on the cargo for all moneys payable hereunder and the Merchants shall be liable for any deficiency.

2. The Master shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or anything else given by the Government of the Nation under whose flag the vessel sails or any department thereof or any person or persons acting or purporting to act with the authority of such Government or of any department thereof or by any committee or person having under the terms of the war risks insurance on the vessel the right to give such orders or directions, and if by reason of or under the authority of any such orders or directions any of the ports named in this Charter-Party as ports of loading or discharge are excluded to the vessel either on account of blockade or otherwise, the Master may call at and discharge cargo at any other port within the limits of the Charter-Party. Any extra expense incurred in connection with any such orders or directions shall be paid by the Merchants in addition to the freight and primage and all other charges payable hereunder, such extra expense to be calculated according to the vessel's tariff current at the time of arrival at the port of discharge or at the time of abandonment of the voyage. The vessel shall have a lien on the cargo for all moneys payable hereunder and the Merchants shall be liable for any deficiency.

C.A.U.K. London—25th September, 1939

Form No. 103—Printed and Sold by Wm. A. Gay & Co., New York 10013

BOTH TO BLAME COLLISION CLAUSE

If the Master, Pilot, or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

Form No. 103—Printed and Sold by Wm. A. Gay & Co., New York 10013

RIDER TO CHARTER PARTY OF THE LIBERIAN S/S "YUCATAN" TO BE RENAMED "EASTERN ARGO" DATED NOVEMBER 18TH, 1964

29. SUBJECT TO MASTER'S APPROVAL, CHARTERERS ARE NOT REQUIRED TO LOAD CARGO, BALLAST OR FUEL IN DEEPTANKS OR CROSS BUNKERS.

30. UNDERSTOOD VESSEL HAS NOT TRADED CUBA SINCE JANUARY 1, 1962.

31. CHARTERERS ARE NOT TO BE RESPONSIBLE FOR STEVEDORE OR OTHER DAMAGE UNLESS NOTIFIED IN WRITING WITHIN 48 HOURS. MASTER TO COOPERATE WITH CHARTERERS AND THEIR AGENTS IN GIVING PROMPT NOTICE OF CLAIM IN WRITING TO PARTY CAUSING DAMAGE.

32. OWNERS GUARANTEE THAT VESSEL IS NOT INTENDED FOR BREAK-UP UPON COMPLETION OF THE ENGAGEMENT ENTERED INTO UNDER THIS CHARTER PARTY. SHOULD OWNERS, CONTRARY TO THE ABOVE GUARANTEE, SELL THE VESSEL FOR BREAK-UP BEFORE SHE HAS BEEN COMPLETELY DISCHARGED AND RELEASED BY THE RECEIVERS OF THE CARGO, THEN OWNERS TO PAY WHATEVER INSURANCE PENALTY MIGHT BE ASSESSED AGAINST CHARTERERS FORTHWITH.

33. VESSEL TO TENDER CLEAR OF SWEAT BATTENS AND ANY OBSTACLES THAT MIGHT BE HINDERING THE LOADING AND DISCHARGING OF SCRAP INCLUDING TRIMMING HATCH COVERS AND LADDERS; TANKTOPS, TUNNELS, EXPOSED CABLES AND PIPES TO BE ENTIRELY AND PROPERLY PROTECTED BY THE VESSEL AGAINST THE HAZARDS NORMALLY CONNECTED WITH A SCRAP CARGO; BROKEN OR SPLIT BOARDS, CARGO BATTENS, DUNNAGE AND LOOSE PROTECTION ON TANKTOPS NOT TO BE CONSIDERED AS PROPER PROTECTION. CHARTERERS AND STEVEDORES NOT TO BE RESPONSIBLE FOR DAMAGES TO SWEAT BATTENS, HATCH COVERS AND TRIMMING HATCH COVERS, LADDERS AND ANY OBJECT IF STORED IN SUCH A WAY THAT THEY ARE EXPOSED TO CONTACT WITH THE CARGO. CHARTERERS AND STEVEDORES NOT TO BE RESPONSIBLE FOR DAMAGES TO LADDER BRACKETS AND BATTEN CLIPS, REMOVABLE OR UNREMOVABLE; TANKTOPS, TUNNELS, EXPOSED CABLES AND PIPES NOT ENTIRELY AND PROPERLY PROTECTED BY THE VESSEL AGAINST THE HAZARDS NORMALLY CONNECTED WITH A SCRAP CARGO. WARRANTED BULKHEAD SHEATHING AND LANDING PADS ON TANKTOPS TO BE IN GOOD CONDITION.

34. IF VESSEL CALLS AT ANY U. S. PORT FOR PURPOSES OF LOADING OR DISCHARGING CARGO AND/OR EMBARKING OR DISEMBARKING PASSENGERS, VESSEL'S CARGO GEAR AND ALL OTHER EQUIPMENT SHALL COMPLY WITH REGULATIONS ESTABLIGHED BY U. S. PUBLIC LAW 85-742 PART 9 (SAFETY & HEALTH REGULATIONS FOR LONGSHORING). IF LONGSHOREMEN ARE NOT PERMITTED TO WORK DUE TO FAILURE OF THE MASTER AND/OR OWNERS AND/OR OWNERS' AGENTS TO COMPLY WITH THE AFOREMENTIONED REGULATIONS, ANY DELAY RESULTING THEREFROM SHALL BE FOR OWNERS' ACCOUNT.

35. CHAMBER OF SHIPPING WAR RISKS CLAUSES 1 AND 2, NEW JASON CLAUSE AND NEW BOTH-TO-BLAME COLLISION CLAUSE, AS ATTACHED, TO BE CONSIDERED FULLY INCORPORATED IN THIS CHARTER PARTY.

36. EXTRA WAR RISK INSURANCE FOR CHARTERERS' ACCOUNT.

37. THIS FIXTURE IS SUBJECT TO DELIVERY OF THE VESSEL TO THE BUYERS UNDER A SALE CONTRACT WHICH HAS ALREADY BEEN CONCLUDED.

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OCTOBER TERM, 1966

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No. 632

FUKAYA TRADING CO., S. A.,
Petitioner

versus

EASTERN MARINE CORPORATION,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

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The petition for certiorari is based on two propositions rejected after full consideration by the Court of Appeals:

a—After a vessel's arrival at the loading port specified in a previously executed, admittedly valid time-charter, her delivery to the charterer's strike-bound wharf was a condition precedent to the effectuality of the entire charter, preventing invocation of the arbitration clause to resolve a dispute over hire accruing during the strike.

b—The respondent shipowner, after formal demand for arbitration of the foregoing dispute, waived its right thereto by loading the vessel, under a reservation of rights, after the strike.

Petitioner cites no authority not cited to the Court of Appeals, nor does petitioner attempt to show any national or regional importance in the first question, much less the second.

While petitioner suggests that the first question is novel, the right to arbitration of a dispute over delivery of a vessel has been affirmed by the Second Circuit, in *In re Pahlberg Petition,* 131 F2d 968 (1942), and now, on the authority of *Pahlberg,* by the Fifth.*

The questions presented are characterized by inter-Circuit accord, not conflict.

It is respectfully submitted that the petition for certiorari should be denied.

Brunswick G. Deutsch,
Attorney for Respondent

William S. Stone,
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Deutsch, Kerrigan & Stiles,
Doman, Dunn & Zuckerman,
Of Counsel
October, 1966

* Accord: *In re Utility Oil Corporation,* 69 F2d 524 (CA 2-1934), cert. den., 292 US 655; *International Refugee Organization vs Republic S. S. Corp.,* 93 FS 798 (DC Md.-1950).